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Supreme Court, U.S.
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In the

Supreme Court of the United States

RICHARD ALLEN ROSELL, ON BEHALF OF HIMSELF AND SIMILARLY SITUATED EMPLOYEES OF THE FEDERAL ENERGY REGULATORY COMMISSION,

Petitioners,

v.

PAT WOOD, III, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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53 pp

QUESTIONS PRESENTED

Nearly 2 million Federal Civil Service Employees (including the petitioner and the class he represents) are subject to the mandates of the Civil Service Reform Act ["CSRA"], 5 U.S.C. § 7101, et. seq., that they collectively bargain through their respective units collective *contracts*, known as Labor/Management Agreements ["LMAs"], involving terms and conditions of their employment. Exhaustion of remedies theories *cum* the so-called "exclusivity" provision of the CSRA, 5 U.S.C. § 7121, are interposed as jurisdictional issues depriving federal civil service employees disposition of their disputes under LMAs by the federal courts. The questions presented are:

1. Where the petitioner (on behalf of his class) demanded his Seventh Amendment right to jury trial under the Federal Constitution and further invoked jury trial pursuant to the Federal Arbitration Act, 9 U.S.C. § 4, to resolve *highly contested contractual issues* under the LMA applicable to him, was it proper for the courts below to resolve those *contractual issues* without a jury by simply labeling the disputed *contractual issues* as jurisdictional? Conversely, whether the "exclusivity" provision of the CSRA, i.e. 5 U.S.C. § 7121, as applied or *per se*, is unconstitutional as breach of the Seventh Amendment to the extent that it precludes or is construed to preclude jury trial resolution of contested *contractual issues* arising under CSRA mandated LMAs?

2. Is there a constitutionally cognizable *"cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings"* and, if so, whether the petitioners were disparately denied the promises and benefits of the principle inasmuch as the forums

below did not afford *any hearing* (not even a status conference) on any factual dispute or any other matter related to the causes of action since the filing of the complaint in the district court on June 19, 2001?

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OPINIONS BELOW

The district court's Order and Memorandum Opinion filed March 27, 2002 summarily dismissing petitioner's Complaint for lack of subject-matter jurisdiction appears at pages 6a through 17a. The judgment of the court of appeals, filed May 15, 2003, affirming the district court's dismissal is proffered at pages 2a - 3a, and its Order denying the petition for rehearing *en banc*, filed June 27, 2003, is provided at page 1a. To abet review of the petition, Petitioners also proffer the orders of the appeals court filed November 13, 2002 (at pages 4a-5a), November 18, 2002 (at pages 19a-20a), February 19, 2003 (at page 21a) and April 15, 2003 (at pages 22a-23a).

JURISDICTION

The judgment of the court of appeals was entered May 15, 2003, and the petition for rehearing *en banc* was denied June 27, 2003. This Petition for Writ of Certiorari is filed within 90 days therefrom, *vide* 28 U.S.C. § 2101(c). Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

United States Constitution, Seventh Amendment: Right to trial by jury

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall otherwise be reexamined in any Court of the United States, than

according to the rules of the common law."

The Federal Arbitration Act, 9 U.S.C. § 1, et. seq.

"§ 4 (relevant text)

"…. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, ..., the court shall hear and determine the issue. Where such an issue is raised, *the party alleged to be in default may ... demand a jury trial of such issue*, and upon such demand *the court shall make an order referring the issue or issues to a jury* in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. *If the jury find* that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. *If the jury find* that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." [Emphasis added].

The Civil Service Reform Act ["CSRA"], 5 U.S.C. § 7101 et. seq.

The "exclusivity" provision of the CSRA (relevant text):

> "§ 7121:
> "(a)(1) Except as otherwise provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures *shall be the exclusive administrative procedures* for resolving grievances which fall within its coverage. (Italics added)
>
> "(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement."

STATEMENT

1. Petitioner is a federal civil service employee in the service of the Federal Energy Regulatory Commission ["the Agency" or "Respondent"] for 24-years. At the time when the underlying controversy arose, he was also a member of the American Federation of Government Employees, Local # 421 ["the Union"]. Throughout his tenure, including his position as a GS-13 regulatory auditor, he was a beneficiary of the employee benefits prescribed by the Fair Labor

Standards Act ["FLSA"], 29 U.S.C. § 201 et. seq. *cum* the Federal Employee Pay Act ["FEPA"], 5 U.S.C. § 5542.

2. Sometime in 2000, the Agency went through changes in its top management following which it altered its administration of the employee benefits envisioned by the FLSA *cum* FEPA. Petitioner became a victim of the changed practices of the Agency and was repeatedly denied the compensatory time benefits that he had previously been afforded. As envisioned by the precise language of the Labor/Management Agreement ["LMA"], Article 17-Section 15, *Petitioner filed his grievance with the Union on behalf of himself and similarly situated employees of the Agency* ["the Petitioners"]. On June 11, 2001, the Union declined representation and apprized Petitioner to pursue the grievance on his own. Yet, by its very construct, *the LMA vests the rights to pursue and redress grievances impacting more than one employee exclusively in the Union and Management.* Neither the Petitioner nor any individual employee is granted any right under the LMA to individually undertake a grievance step *when the grievance is asserted on behalf of similarly situated employees, in a class context or impacting more than one employee.* Thus, with the Union declining to represent Petitioner in his class-based grievance, *Petitioner duly and fully exhausted the administrative remedies contractually stipulated for him under the LMA.* He had no further procedure to follow, grievance remedies to exhaust, or contractual obligations to fulfill within the purview of the LMA which is the complete reposit of the contractual rights and obligations for the Petitioner and the class he represents.

3. With no other administrative remedy left to pursue, the Petitioner then filed his claims in the district court on behalf of himself and similarly situated

employees of the Agency. He asserted in the Complaint his *constitutional jury demand as to all issues triable by right to jury.* The Agency never filed an Answer. Instead, it moved to "Dismiss or, in the alternative, for Summary Judgment." It asserted its dismissal motion under F.R.Civ.P. Rule 12(b)(1), "lack of jurisdiction over subject matter," and 12(b)(6) "failure to state a claim upon which relief may be granted." In the alternative, the Agency also moved for summary judgment pursuant to Rule 56(c) in the event the court considered "matters outside of the pleadings." It attached to the motion matters (*consisting of sixty three pages*) completely extraneous to the pleading which, then as now, is limited to *the Complaint* before the district court and none other [see Rule 7(a), F.R.Civ.P.].

4. On September 4, 2001, Petitioner filed his *Conditional* Opposition to the defense motion. He enunciated, *inter alia*: (1) that, the defense motion which combined a jurisdictional motion with a summary judgment motion is, *per se*, improper and flawed as a matter of law; (2) that, because the defense motion is dispositive, Petitioner must be granted evidentiary hearing; (3) that, per applicable law, the district court informs him of how it intends to treat the motion–as a jurisdictional or summary judgment motion; (4) that, should the court treats the motion as a summary judgment motion by considering matters outside the pleadings, Petitioner must be granted "reasonable opportunity" for discovery as mandated by law; (5) that, *he be granted "evidentiary hearing" on all contested issues of material contractual facts and jury trial as envisioned by statutory mandate [vide the Federal Arbitration Act, 9 U.S.C. § 4] and his Seventh Amendment constitutional jury demand;*(6) that he "will present his own testimony and the testimonies of his witnesses at the evidentiary hearing requested."

5. On September 28, 2001, the Agency filed its Reply to Petitioner's Conditional Opposition attaching, once again, additional *materials extraneous* to the pleading. Nevertheless, completely ignoring all of Petitioner's lawful requests for procedural fairness and due process as proffered in his Opposition, the district court failed to provide Petitioner *any* opportunity for discovery. He was, likewise, denied all opportunity to be heard in open court. The district court equally disregarded Petitioner's constitutional and statutory demands and pleas for jury trial on the myriad of highly contested contractual fact issues permeating the motion and opposition thereto. Instead, *the district court summarily dismissed the Complaint by resolving in chambers (and in the absence of any hearing) highly contested issues of material contractual facts arising under the LMA and serve as the fulcrum and sum total of the disputes between the parties.*

6. In its Order and Memorandum Opinion, the district court resolved: (a) that Petitioner has stated cause of action under the FLSA upon which relief may be granted and that the court has jurisdiction over the claims, [see page 11a] but (b) the court is without subject matter jurisdiction over the same claims because "it is precluded by the CSRA" inasmuch as "plaintiff did not attempt to comply with the negotiated grievance process and therefore did not exhaust the remedies available to him." [see pp. 17a-18a].

7. Inevitably, Petitioners' appealed *seeking review of the complete failure of process* that brought about the summary dismissal of the Complaint. The appeal was not then nor is it now an appeal from the conjectural findings of fact of the district court–right or wrong. *It is an appeal from the district court's distinct departures from constitutional and statutory mandates for jury*

trial disposition of the same contractual disputes and issues it resolved in chambers. It is an appeal from the district court's departures from cardinal principles of fairness and justice enshrined in the court of appeals' own principled pronouncements as well as in constitutional mandates.

8. The Agency responded to the appeal by filing a Motion for Summary Affirmance which Petitioners opposed. A panel of the appeals court denied Respondent's motion by its order filed November 13, 2002 [see pages 4a-5a] and established a briefing schedule [see page 19a]. Following the filing of Petitioners' opening brief, the court, on its own motion, also scheduled the case for oral hearing on May 6, 2003 [see page 21a] but, subsequently, rescinded its grant of oral argument [see page 22a]. Thus, since its initiation in the district court on June 19, 2001, this case was never heard, argued, litigated, prosecuted or defended in open court in either of the forums below. It has been shunned and shunned it has been!

9. On May 15, 2003, the appeals court rendered its judgment in the absence of oral hearing, following the same *modus operandi* of the district court–dismissing a case without ever affording any hearing, evidentiary or otherwise. Enter the era of mechanical justice where the citizenry are faceless, emotionless, passionless, demeanor-less, disposition-less, and need not be seen or heard from. They exist on paper, they speak through paper, and the justice they are promised lives or dies on paper. Consistent with this observation, the appeals court affirmed the judgment of the district court concluding:

> "The district court dismissed the claim for lack of subject matter jurisdiction on

> the ground that the appellant failed to exhaust his administrative remedies under the exclusive labor management agreement between his employer ... and his union .... For the reasons articulated by the district court we agree that Rosell did not comply with the grievance procedures provided by the agreement, as he was required to do under the [CSRA], 5 U.S.C. 7121(a) ...." [pp.2a-3a].

Yet, the appeal had nothing to do with whether or not the district court correctly or incorrectly surmised into the facts. It was an *appeal about the complete failure of process* resulting in flagrant violations of Petitioners' Seventh Amendment constitutional right to jury trial, their statutory right to jury trial, their demands for evidentiary hearing abnegated by the district court, their procedural rights to discovery arbitrarily repressed, their rights to fair and due process that could not be detected in any act, any finding, or any process engaged in by the district court!

The reasons for granting the writ are amplified below.

REASONS FOR GRANTING THE WRIT

A. Preservation and Enforcement of the Seventh Amendment Jury Trial Rights of Nearly Two Million Federal Civil Servants are Compelling Reasons for Granting the Writ

This petition is about the constitutional guarantee of the right to trial by jury, further endorsed by statutory grant of jury trial right, which have been disregarded

and denied to the Petitioners and nearly two million others.

With distinct clarity, the Seventh Amendment to the United States Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall otherwise be reexamined in any Court of the United States, than according to the rules of the common law."

This is understood as "the right to trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted." *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). That the Amendment imposes restraint on the legislature from legislative erosion of jury trial rights is duly recognized albeit "only those incidents, which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature." *Tull v. United States*, 481 U.S. 412, 426 (1987). See also *Galloway v. United States*, 319 U.S. 372, 392 (1943); *Markman*, op. c.it., pp. 377-378.

Recognizing that the "substance of the common law right" under the Seventh Amendment is "a blunt instrument for making distinctions," *Markman*, op. cit., page 378, the judicial de-blunting of the Amendment had been confined to distinctions between "substance and procedure" or distinctions "between issues of fact and law." See, inter alia, *Baltimore & Carolina*, op. cit., at

page 657; *Galloway*, op. cit., pp. 390-391; *Ex Parte Peterson*, 253 U.S. 300, 309-10 (1920); *Walker v. New Mexico & Southern Pacific R. Co.*, 165 U.S. 593, 596-7 (1897); *Markman*, op. cit., page 378.

Even when there has been legislative, i.e. Congressional, intrusion into the territory of the Seventh Amendment, it has been made with a commitment to preserve the substance and essence of the system of trial by jury. Thus, for example, when Congress enacted the Federal Arbitration Act ["FAA"], 9 U.S.C. § 1, et. seq., (a statute at issue at bar), it ensured that the knowing and voluntary decisions of contracting parties to resolve their disputes by arbitration, instead of jury trial rights guaranteed them by the Amendment, shall itself be subject to jury trial disposition if a contracting party disputes the existence of a valid or binding contract to arbitrate. Hence, 9 U.S.C. § 4 provides, in relevant part:

> "..... *If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue*, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, ..., the court shall hear and determine the issue. Where such an issue is raised, *the party alleged to be in default may ... demand a jury trial of such issue*, and upon such demand *the court shall make an order referring the issue or issues to a jury* in the manner provided by the Federal Rules of Civil Procedure, *or may specially call a jury for that purpose. If the jury find* that no agreement in writing for arbitration was made or that there is no default in

> proceeding thereunder, the proceeding shall be dismissed. *If the jury find* that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration ...." [Italics added].

Whether conscribed by the English common law when the Amendment was adopted or bottomed in English or American practices, the reposit of contract and tort law has been the common law and contract and tort disputes are "suits at common law" within the precise language of the Seventh Amendment. Regardless of how the issues in this matter are construed–as claims, counterclaims or defenses–each and all of them pertain to routine contract disputes that are "suits at common law" and subject to jury trial rights without legislative or judicial encroachment. Indeed, so plain are the contractual content of the issues in this matter that no room was left for compromising the right preserved to the Petitioners by the Seventh Amendment tangent to a single issue of fact addressed and resolved both by the district and appellate courts without once affording the Petitioners any right to be heard in any open forum.

The Petitioners' demand for jury trial "as to all issues triable by right to jury" made no distinction as to whether the issues to be adjudged were camouflaged as claims, defenses or counterclaims. And to the extent that the Respondent claimed that Petitioner is subject to mandatory contractual obligation to arbitrate his claims, Petitioner also invoked and reinforced his constitutional jury trial demand with statutory jury trial demand granted him under the provisions of the FAA, 9 U.S.C. §

4. Petitioner denies and continues to deny that he has any contractual obligation to arbitrate any of the issues at bar under any contract including the Labor/Management Agreement (or as the district court refers to it "collective bargaining agreement", at page 13a).

In sum, ALL of the issues that the district court addressed and resolved in chambers are contract disputes under the LMA. They involve Petitioner's fervent claims that he has fulfilled all of his obligations under the terms of the LMA as against the Respondent's dispute that he did not. They involve disputes as to which provisions of the contract, the LMA, applied to his circumstances [LMA Article 17 § 11 or Article 17 § 15]. They involve the fact-intensive breach of contract claims by the Respondent and Petitioner's own fact-intensive breach of contract counterclaims against the Respondent. They involve Petitioner's profound claims that the Union has engaged in collusion ["cohabitation"] with Management to deprive him and similarly situated employees of the Respondent the benefits granted them under the contract, the LMA. Indeed, there is no iota of fact or issue addressed and resolved by the district court that did not pertain to contract. NONE!

There is no special legal stance or place that a collective bargaining agreement [or LMA] occupies because it is negotiated and contracted under the aegis of the Civil Service Reform Act ["CSRA"], 5 U.S.C. § 7101. It is a contract like any other. Held, ***"even with respect to employees covered by the CSRA ... the scope of an employee's grievance rights is determined by contract."*** *Suzal v. United States Information Agency*, 32 F.3d 574, 585 (1994).

Nor does the Respondent's claim, and the courts' accord, that arbitration is the exclusive remedy for the Petitioner's claims remove what is, otherwise, a contract-based dispute from Petitioners constitutional and statutory demands that the very existence of a binding arbitration contract be resolved by a jury. For, it has been held, that ***"courts are to enforce privately negotiated agreements to arbitrate, like other contracts, according to their terms."*** *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63(1995); *Dean Witter Reynolds, Inc. v. Bird*, 470 U.S. 213, 219 (1985); *First Options of Chicago, Inc. v. Kaplan*, 513 U.S. 938, 943 (1995).

The question is whether the district court's *labeling* and the appeals court's blessing, of the contested, material contractual issues of fact in this matter as *"jurisdictional"* eliminate, alter or modify Petitioners' demands for jury trial disposition of the same issues. It is respectfully submitted that such designation or labeling in no way erodes the primacy of the Seventh Amendment or diminish the statutory right of the Petitioners to have the so-called "jurisdictional" contractual issues adjudged by a jury.

At the outset, the bare language of the Amendment– "(i)n suits at common law, ..., the right of trial by jury shall be preserved"– does not distinguish between common law contract issues ultimately impacting a court's jurisdiction and those that do not. A court may still dismiss a claim for lack of subject matter jurisdiction *after* disputed common law issues impacting its jurisdiction have been adjudged by a jury. Such, indeed, is the very construct of the FAA. If parties knowingly and voluntarily contract a valid arbitration

contract and then seek to submit their dispute subject to such contract for disposition by the courts and jury trials, the federal courts lack subject-matter jurisdiction to address the dispute. If, on the other hand, a contracting party disputes the existence or validity of such a contract, by statutory mandate, the issue is to be resolved by a jury if the party so chooses, *vide* 9 U.S.C. § 4. A jury's disposition of the issues, i.e. the existence and validity of an arbitration contract, would then afford the court to dismiss the case on jurisdictional grounds. Nothing in jurisdictional jurisprudence would suggest otherwise or provide cover to deprive Petitioners' their constitutional and statutory entitlement to jury trial on all of the contractual issues disposed of by the district court in chambers and then affirmed by the appeals court in total misapprehension of the bases of Petitioners' appeal.

Suffice it to note here that case law does not suggest that there was a pure jurisdictional question that could have served as a basis for the district court to abnegate the Petitioners' demand for jury trial rights or for the appeals court to affirm the deprivation of such a fundamental right. To wit:

Endorsing the appeals court's observation in *United States v. Vanness*, 85 F.3d 661, 663 (1996), this Court noted: "Jurisdiction is a word of many, too many, meanings." *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998). Howe-er, "(i)t is firmly established ... that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e. the court's statutory or constitutional power to adjudicate the case." *Steel Co.* at 89.

> Further held, citing *Bell v. Hood*, 327 U.S. 678, 682 (1946), "'[j]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.' Rather, the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Steel Co.* at 89.
>
> And, addressing jurisdictional dismissal, held: "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper *only when* the claim is [quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)] 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit not to involve federal controversy.'" *Ibid.*

Nevertheless, it is settled that a district court may not address merits questions before it satisfies itself that it has Article III § 2 jurisdiction over the pending controversy, i.e whether or not it has a justiciable case involving the standing of the parties. *Steel Co., at 102-104.* And, in this sense, this Court has pronounced the:

> "The 'irreducible constitutional minimum of standing' contains three requirements.... First, injury in fact ....

> Second, there must be causation–a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant.... And third, there must be redressability–a likelihood that the requested relief will address the alleged injury. This triad of injury in fact, causation, and redressability constitute the core of Article III's cases-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co.*, *op. cit.*, 102-104.

Upon the construct of *Steel Co.*, the appeals court itself has made distinctions between *"pure jurisdictional questions"* that require disposition before resolution of merits questions and those *"less than pure jurisdictional," "quasi-jurisdictional" or "hybrid" questions* which need not be resolved before merits questions. See *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1000 (D.C. Cir. 1999). Citing *Steel Co.*, the appeals court also concluded "that a question of Article III standing must be decided before the statutory question whether a cause of action exists." *U.S. Ex Rel. Long v. SCS Business & Technical*, 173 F.3d 890, 891 (1999).

Applying these tenets to the case at bar, there is no question that Petitioners fulfilled all of the pure jurisdictional conditions for the district court's resolution of the merits of their claims. The court itself concluded:

> "Based on the preceding record, *the Court finds ... that plaintiff Rosell has proffered sufficient jurisdictional facts to overcome a motion to dismiss for*

> *lack of subject-matter jurisdiction* premised on the failure of the FLSA to provide a cause of action for plaintiff Rosell. .... Therefore, defendant's motion to dismiss does not merit relief, insofar as it is based upon plaintiff's Rosell's failure to establish jurisdiction under the FLSA." [see page 11a.]

However, the district court reversed its conclusions and summarily dismissed the claims reasoning: *"Rosell did not attempt to comply with the negotiated grievance process and therefore did not exhaust the remedies available through the CSRA. ... [Accordingly, the court] does not have subject matter jurisdiction over this case because it is precluded by the [CSRA]."* [see page 17a], italics added.

This is in error. Although, in 1994, the appeals court deemed exhaustion of remedies under the CSRA "*jurisdictional*,"(*Suzal*, op. cit., at 585) and the Supreme Court has pondered "the exhaustion question ... [to be] ***arguably*** *jurisdictional*" (*Steel Co.*, op. cit., at 100), the holdings in *Steel Co.* itself and the referenced 1999 decisions of the appellate court both *In re Sealed Case No. 99-3091*, and *U.S. Ex Rel. Long*, supra, do not render "exhaustion of remedies" as a "pure jurisdictional question" the resolution of which must precede merits questions.

On the contrary, the most that can be said of 'exhaustion of non-judicial remedies' is that it is a "less than pure," "quasi" or "hybrid" question the disposition of which must await the merits questions. *More so, as in this case, when the exhaustion of remedies issues are deeply entangled in highly contested issues of contractual facts involving the interpretation and*

fulfillment of the parties' respective contractual commitments under the LMA. It is "exceedingly artificial to draw a distinction between the two (i.e. the merits and the jurisdictional issues)" *U.S. Ex. Rel. Long*, *op. cit.*, at 896, when resolution of the same factual disputes serves to redress both the merits questions and quasi-jurisdictional issue. There was no compelling pure jurisdictional issue to validate the summary dismissal of the claims at bar *absent jury trial proceedings to resolve the contested contractual issues.* After all, jurisdiction is an issue that can even be raised and resolved on appeal, see, inter alia, *Booth v. U.S.*, 990 F.2d 617 (Fed. Cir. 1993).

There is absolutely nothing in jurisdictional jurisprudence or any other rationale that could possibly support or sustain the flagrant deprivation of Petitioners' fundamental Seventh Amendment as well as specific statutory rights to jury trial. If, in whatever content it is interpreted or applied or *per se*, the so-called "exclusivity" provision of the CSRA, 5 U.S.C. § 7121, does sustain (as the district court concluded) the disposition of disputed common law contractual issues by the court (in chambers) and in the absence of a jury, if the provision so much as limit the rights of the Petitioners and nearly two million other Federal Civil Service employees subject to the Act from invoking their constitutional jury trial rights and adjudicating contractual disputes arising under LMAs by a jury, then the statute is a clear breach, a distinct violation, of the Amendment. In such order, it must be rendered unconstitutional.

B. Equitable Enforcement of "Cardinal Principles of Justice" Pleaded for but Denied to the Petitioners is yet Another Compelling Reason for Granting the Writ

Since the filing of the complaint in the district court on June 19, 2001, the Petitioners had not been afforded any hearing– evidentiary or non-evidentiary–in any of the forums below. Although the appellate court did schedule the case for oral argument (which would have been the first instance of any hearing at all), it rescinded the oral argument granted (see pages 21a-22a).

Yet, the appeals court is noteworthy for its most noble dicta and pronouncements on cardinal principles of justice and fairness. In language unambiguous, it pronounced a defining content of our system of justice. Held:

> "It is a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings. Any other course would be contrary 'to the spirit which imbues our judicial tribunals prohibiting decisions without a hearing.' {Quoting} *Sims v. Greene*, 161 F.2d 87, 88 (3rd Cir. 1947). ....
>
> "Only when the facts are not in dispute, or when the adverse party has waived its right to a hearing, can that significant procedural step (i.e the requirement for open court trial-like evidentiary proceedings) be eliminated." *U.S. v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001). Upon such dicta, the appeals

> court concluded that "the District Court violated the company's (Microsoft's) procedural rights by ordering (the structural relief) without an evidentiary hearing." *Ibid.* at page 103.

This profoundly compelling cardinal tenet of justice was the predicate for Petitioners' appeal. Indeed, it was and is absolutely irrelevant to the appeal whether or not the district court correctly or incorrectly reached its factual conclusion that the Petitioner did not exhaust his administrative remedies under the LMA. The crucially contested issues of material contractual facts before the district court were not resolved by conducting anything that remotely resembles *"trial-like evidentiary proceedings."* They were *not heard in* a forum that would suggest an *"open court."* Petitioners' repeated pleas to the district court to be afforded evidentiary hearing on the dispositive defense motion, despite proffers of testimonies, despite plentitude of authorities promising such hearings, despite constitutional and statutory demands for jury trial proceedings, the district court resolved all the contested issues of material contractual facts in chambers without any hearing or even the pretense of a hearing! Whatever the conclusions of the district court may be, they have been reached in the absence of open court trial-like evidentiary proceedings, they have been reached without any hearing, they have been reached *contrary "to the spirit which imbues our judicial tribunals prohibiting decisions without a hearing."*

Nothing suggests that the *"cardinal principle of our system of justice that factual disputes must be heard in open court"* is confined to the litigants in *Microsoft.* It has been said "what is good for the gander is good for the goose." Certainly, what is good for *Microsoft* is

good for the Petitioners. They should never be left wondering why such a seminal tenet of justice has been so disparately applied and denied to them.

In yet another decision addressing a dispositive motion akin to that Petitioners faced in the district court, the appeals court further enunciated *"guiding principle" of "fairness"* and procedural steps which again were abnegated in the case at bar:

> "Fairness, not excessive technicality, is the guiding principle .... The mandatory language in which Rule 12(b) is couched underscores the importance of providing plaintiffs with the essential safeguards of summary judgment procedure whenever they face a motion to dismiss that turns on questions of fact. Even under Rule 12(b)(1), procedural safeguards equivalent to those in Rule 56 are required, with Rule 56 used selectively as a guide to ensuring fairness. [Citations omitted]. Where facts material to [jurisdiction] ... are in dispute, both fairness and analogy to Rules 12(b)(6) and 56 require that the court provide the parties with a full opportunity to air their factual dispute. Furthermore, they direct the court to take evidence on the question if the parties affidavits do not suffice to eliminate all genuine issues of material fact....
>
> "The importance of fairness in factfinding at any stage requires this approach, ..." *Gordon v. National Youth*

Work Alliance, 675 F.2d 356, 260-361 (D.C. Cir. 1982).

Here again, the record is replete with Petitioners' specific reliance on the tenets herein pronounced and seeking the benefits of the precise procedural fairness the decision articulates. The essential safeguards of summary judgment, including reasonable opportunity for discovery, were denied to the Petitioners despite specific pleas for such opportunity. The safeguard that assured the Petitioners that the district court would inform them of its intent on how it would treat the defense motion [as a Rule 12(b)(1) or Rule 12(b)(6) cum Rule 56(c) motion] was not afforded them despite specific pleas to that end. The opportunity to fully air Petitioners' factual disputes at an evidentiary hearing was likewise denied. It is incomprehensible that the appeals court found any reason, any reason at all, to summarily affirm the district court's decision! It truly is incomprehensible!

CONCLUSION

WHEREFORE, for the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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Attorney for Petitioners

No. 02-5129

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Richard Allen Rosell, On behalf of himself and similarly situated employees of the Federal Energy Regulatory Commission,
Appellant

v.

Pat Wood, III, Chairman, Federal Energy Regulatory Commission,
Appellee

June 27, 2003, Filed

JUDGES: BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges.

OPINION: ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

No. 02-5129

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Richard Allen Rosell, On behalf of himself and similarly situated employees of the Federal Energy Regulatory Commission,
Appellant

v.

Pat Wood III, Chairman, Federal Energy Regulatory Commission,
Appellee

May 15, 2003, Filed

COUNSEL: For RICHARD ALLEN ROSELL, Plaintiff - Appellant: Wendu Mekbib, Law Office of Wendu Mekbib, Vienna, VA.

For PAT WOOD, III, Defendant - Appellee: R. Craig Lawrence, Claire M. Whitaker, Assistant U.S. Attorneys, Roscoe Conklin Howard, Jr., U.S. Attorney, U.S. Attorney's Office, Washington, DC.

JUDGES: Before EDWARDS, SENTELLE, and GARLAND, Circuit Judges.

OPINION: JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. Appellant Rosell appeals from the district court's dismissal of his claim alleging his employer violated the overtime pay

provisions of the Fair Labor Standards Act, 29 U.S.C. § 207(a) (1998). The district court dismissed the claim for lack of subject matter jurisdiction on the ground that appellant failed to exhaust his administrative remedies under the exclusive labor management agreement in place between his employer, the Federal Energy Regulatory Commission, and his union, American Federation of Government Employees, Local No. 421. For the reasons articulated by the district court we agree that Rosell did not comply with the grievance procedures provided by the agreement, as he was required to do under the Civil Service Reform Act, 5 U.S.C. § 7121(a) (1996). Accordingly, it is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P.41(b); D.C. Cir. Rule 41.

Per Curiam

No. 02-5129

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Richard Allen Rosell, on behalf of himself and similarly situated employees of the Federal Energy Regulatory Commission,
Appellant

v.

Pat Wood, III, Chairman, Federal Energy Regulatory Commission,
Appellee

November 13, 2002, Filed

COUNSEL: For RICHARD ALLEN ROSELL, Plaintiff-Appellant: Wendu Mekbib, Law Office of Wendu Mekbib, Vienna, VA.

For PAT WOOD, III, Defendant-Appellee: R. Craig Lawrence, Claire M. Whitaker, Assistant U.S. Attorneys, Roscoe Conklin Howard, Jr., U.S. Attorney, U.S. Attorney's Office, Washington, DC.

JUDGES: BEFORE: Edwards, Sentelle, and Henderson, Circuit Judges.

OPINION: ORDER

Upon consideration of the motion for summary affirmance and the response thereto, it is

ORDERED that the motion be denied. The merits of the parties' positions are not so clear as to warrant

summary action. See Taxpayers Watchdog, Inc. v. Stanley, 260 U.S. App. D.C. 334, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 201 U.S. App. D.C. 82, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

Because the court has determined that summary disposition is not in order, the Clerk is instructed to calendar this case for presentation to a merits panel.

Per Curiam

Civil Action No. 01-1355 (RCL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RICHARD ALLEN ROSELL
Plaintiff,

v.

PAT WOOD, III, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION
Defendant.

ORDER

For the reasons given in the Memorandum Opinion issued on this date, the Court hereby GRANTS Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment.

This action shall stand DISMISSED for lack of jurisdiction.

SO ORDERED.

Date: 3-27-02

Royce C. Lamberth
United States District Judge

Civil Action No. 01-1355 (RCL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RICHARD ALLEN ROSELL
Plaintiff,

v.

PAT WOOD, III, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION
Defendant.

MEMORANDUM OPINION

Now before the Court is Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, plaintiff s Conditional Opposition to Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, and Defendant's Reply to Plaintiff s Conditional Opposition. Upon consideration of the pleadings, the relevant decisions of prior federal courts, and the record of this case, the Court will GRANT defendant's Motion to Dismiss.

I. Facts

Plaintiff Rosell brings this suit on behalf of himself and all similarly situated employees of the Federal Energy Regulatory Commission (FERC) for alleged violations of the Fair Labor Standards Act (FLSA) with regard to overtime pay.

Plaintiff Rosell is a full-time GS-13 Auditor employed by FERC. In May and June of 2001, plaintiff Rosell was directed by his supervisor to undertake travel during

"non-duty" hours-that is, during Saturday and/or Sunday-to Houston, Texas and Portland, Oregon. Plaintiff Rosell was denied overtime pay or compensatory time for this travel. Plaintiff Rosell alleges that this denial of overtime pay violates the FLSA.

Defendant Wood now moves for dismissal, asserting that this Court lacks subject matter jurisdiction over this dispute. In the alternative, defendant Wood moves for summary judgment, asserting that plaintiff Rosell has failed to plead facts that would support a finding of liability against the defendant.

II Analysis

A motion to dismiss may be decided on the pleadings alone, construed liberally in favor of the plaintiff. Wilderness Society v. Griles, 824 F.2d 4, 16 (D.C. Cir. 1987). Viewing the facts in the light most favorable to plaintiff Rosell, the Court must determine whether plaintiff Rosell has established sufficient jurisdictional facts.

Defendant's motion to dismiss for lack of subject matter jurisdiction asserts that plaintiff Rosell is an employee "exempt" from the provisions of the FLSA, and that this Court therefore has no jurisdiction over a claim brought by plaintiff Rosell for a violation of the FLSA. In addition, defendant Wood asserts that plaintiff Rosell is a member of a bargaining unit covered by a collective bargaining agreement, and that the remedy set forth in that agreement is the exclusive remedy available to plaintiff Rosell under the Civil Service Reform Act, S U.S.C. § 7101 et seq.

A. Jurisdiction Under the FLSA

Viewing the facts in the light most favorable to plaintiff Rosell, the Court finds that plaintiff Rosell has alleged sufficient jurisdictional facts under the FLSA. Plaintiff alleges that jurisdiction is premised upon 21 U.S.C. § 216(b), which provides that [a]ny employer who violates the provisions of. . . section 207 of this title shall be liable to the employee or employees affected in the amount of ... their unpaid overtime compensation ... An action to recover the liability prescribed ... may be maintained against any employer in any Federal or State court of competent jurisdiction....

28 U.S.C. § 216(b) (1998). Plaintiff does allege a violation of § 207 of Title 21, which regulates the maximum hours which may be required of employees and the manner in which employees shall be compensated if they are required to work beyond the maximum hour limit. The applicability of § 207 is, however, limited by § 213, which provides that "[t]he provision of... section 207 of this title shall not apply with respect to ... any employee employed in a bona fide executive, administrative, or professional capacity . . ." 21 U.S.C. § 213(a)(1) (1998). Defendant Wood asserts that § 207 does not apply to plaintiff Rosell because he is employed in a bona fide professional capacity, which is further defined in the applicable regulations as an employee who meets the all of the following three tests:

(a) The primary duty test.

(1) The employee's work ... requires knowledge in a field of science or learning customarily ... acquired through education ... that meets the requirements for a bachelor's or higher degree, with major study in . . the specialized field as distinguished from general education

... or ... work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty. including knowledge of related disciplines and of new developments in the field.

(b) Intellectual and varied work test. The employee's work is predominantly intellectual and varied in nature, requiring creative analytical, evaluative, or interpretative thought processes for satisfactory performance.

(c) Discretion and independent judgment test. The employee frequently exercises discretion and independent judgment.... in performing the normal day-to-day work.

5 C.F.R. § 551.207. Defendant Wood asserts that plaintiff Rosell is a professional, exempt employee; his job description includes providing financial advice, supervising, and management. Further, defendant Wood argues, the Office of Personnel Management has previously classified plaintiff Rosell as "exempt." See Exhibit 1 to Def. Mot. Dismiss. Plaintiff Rosell argues, however, that he has "always performed supervised auditing functions ... and cannot perform independent, unsupervised, original or creative auditing functions," and that "the tasks ... are predominantly routine, not varied, and do not require a level of advanced scientific knowledge." Obviously, there is significant disagreement about the scope and substance of plaintiff Rosell's duties; while the Court would normally give some form of deference to an agency's determination whether an employee was "exempt" or "non-exempt," see Am. Fed. Gov't Empls. v. Off. Personnel Man., 821 F.2d 761 (D.C. Cir. 1987) ("Congress intended OPM to have a great deal of authority to determine how the FLSA would be

administered in the civil service."), FLSA exemption determinations are "fact-intensive inquiries which frequently turn on the particular duties of specific employees," Abundis v. United States, 18 Ct. Cl. 657, 659 n.2 (Cl. Ct. 1989).

Based on the preceding record, the Court finds for the following reasons that plaintiff Rosell has proffered sufficient jurisdictional facts to overcome a motion to dismiss for lack of subject matter jurisdiction premised on the failure of the FLSA to provide a cause of action for plaintiff Rosell. First, the Court must examine the facts proffered by the parties in the light most favorable to plaintiff Rosell. Second, there is a general presumption that employees are not exempt from the overtime provisions of the FLSA, see Am. Fed. Gov't Empls. v. Off. Personnel Man., 821 F.2d 761, 770-71 (D.C. Cir. 1987) ("FLSA, . . . contains a presumptive rule that employees ... must receive overtime compensation ... [and] the burden is on the employer to demonstrate [that] the employee is in fact exempt."). Third, the FLSA exemptions are to be construed narrowly. See id. Fourth, FLSA exemption determinations are "fact-intensive inquiries which frequently turn on the particular duties of specific employees." Abundis v. United States, 18 Ct. C1. 657, 659 n.2 (Cl. Ct. 1989). Therefore, defendant's motion to dismiss does not merit relief, insofar as is it based upon plaintiff Rosell's failure to establish jurisdiction under the FLSA.

B. Jurisdiction Under the CSRA

The Court will now address the second argument by defendant Wood. Defendant Wood asserts that the collective bargaining agreement between the Federal Energy Regulatory Commission and the American Federal of Government Employees (AFGE) Local No.

421 is the exclusive administrative remedy available to plaintiff Rosell pursuant to the Civil Service Reform Act (CSRA), 5 U.S.C. § 7101 et seq., and that this Court is therefore precluded from adjudicating this dispute. Both parties agree that plaintiff Rosell is a member of the AFGE. For the reasons given the following analysis, the Court finds that it is without subject matter jurisdiction over this dispute because the grievance procedure established by the AFGE is the exclusive process by which plaintiff may seek remedy, and plaintiff has failed to exhaust the remedies available to him through that process. Cf. Suzal v. United States Information Agency, 32 F.3d 574, 585 (D.C. Cir. 1994) ("[E]xhaustion of the nonjudicial remedies provided under the authority of the CSRA is a jurisdictional prerequisite.").

The CSRA "comprehensively overhauled the civil service system" and created a "new framework for evaluating adverse personnel actions against [federal employees]." Lindahl v. Off. Personnel Man., 470 U.S. 768, 773-74 (1985). The Act sets out the "availability of administrative and judicial review" for grievances and disputes between federal agencies and their employees. United States v. Fausto, 484 U.S. 439, 443 (1988).

Specifically, the CSRA directs unions to provide "fair and simple" grievance procedures which are intended to "provide for expeditious processing." 5 U.S.C. § 7121(b)(1) (1996). Those grievance procedures "shall be the exclusive administrative procedures ... for the settlement of grievances." Id.; see also O'Connell v. Hove, 22 F.3d 463 (2d Cir. 1994). This is not absolute exclusivity; there are certain statutory exceptions where the agency or union may not require an employee to proceed with the established grievance procedure, 5 U.S.C. § 7121(a)(1); id. § 7121 (a)(2), or the union may choose to exclude any category of grievances from the

application of the general grievance procedures, see Hennessey v. U.S. Dept. of Defense, 46 F.3d 356, 359 (4th Cir. 1995); Johnson v. Peterson, 996 F.2d 397 (D.C. Cir. 1993). Neither of these situations applies here.

First, the CSRA specifies those complaints for which the union grievance process may not be the exclusive administrative remedy. Subsections (d) and (e) of § 7121 are the exceptions to the general rule that all employee grievances must be addressed through the procedures established by the collective bargaining agreement; subsection (d) covers both pure and mixed discrimination cases, and subsection (e) covers grievance related solely to job actions appealable to the Merit Systems Protection Board (MSPB) under 5 U.S.C. § 4303 and 5 U.S.C. § 7512. See Johnson v. Peterson, 996 F.2d 397, 398-99 (D.C. Cir. 1993). In addition, § 7116(d) provides that employees may seek review by the MSPB for actions that improperly punish or limit an employee's rights to participate in or refuse to participate in union activities. See 5 U.S.C. 7116(d) (1996). Plaintiff Rosell's claim for overtime compensation does not fall under any of these statutory exceptions in the CSRA.

Second, collective bargaining agreements may specifically exclude certain categories of grievances from their procedures. See Hennessey v. United States Dept. of Defense, 46 F.3d 356 (4th Cir. 1995) ("[T]he CSRA requires that federal employees subject to a collective bargaining agreement negotiate with their employing department or agency whether to preserve the FLSA remedy, or instead to commend FLSA claims to the bargained grievance procedures."). That is, the Labor/Management Agreement between the Federal Energy Regulatory Commission and the AFGE ("the Agreement") establishes the grievance procedure for

FERC employees, and also sets out those grievances which are included or may be excluded from the grievance procedure. See Labor/Management Agreement Between the Federal Energy Regulatory Commission and the American Federation of Government Employees Local No. 421, Exhibit 2, Def. Mot. to Dismiss. Article 17 of the Agreement sets out the grievance procedure established by the union and the agency, and explicitly notes that "[t]his procedure shall be the exclusive procedure available to the Union and Bargaining unit employees for resolving grievances except as provided in Section 5 of this Article." Section 5 provides that an "aggrieved employee affected by a removal or reduction in grade based on unacceptable performance as defined in section 4303 of Title 5 and this Article, or adverse action as defined in section 7512 of Title 5 [and] this Article, may at his/her option raise the matter under a statutory appellate procedure [with the MSPB] or the negotiated grievance procedure, but not both." That is, for two specific types of grievances, the employee may choose between an appeal to the MSPB or the union's grievance procedure. These exemptions in the Agreement track the statutory exceptions in the CSRA. Plaintiff Rosell's claim does not fall into either category of grievance for which he might have an option, as discussed in the previous section. Moreover, those grievances for which the employee may opt out of the negotiated grievance procedure must be presented to the MSPB before this Court could even entertain the possibility that jurisdiction in this Court might be proper. Therefore, this Court finds that plaintiff Rosell's grievance is the type which must go through the negotiated grievance procedure, and this Court therefore has no jurisdiction at this time. See Suzal v. United States Information Agency, 32 F.3d 574, 585 (D.C. Cir. 1994) ("[E]xhaustion of the nonjudicjal remedies

provided under the authority of the CSRA is a jurisdictional prerequisite.").

The last issue which must be addressed by this Court is plaintiff Rosell's assertion that jurisdiction in this Court is proper because he did attempt to comply with the negotiated grievance procedure and the AFGE failed to properly address his grievance. In his Conditional Opposition to Defendant's Motion to Dismiss, plaintiff Rosell has attached correspondence related to his attempt to proceed with the union's grievance procedure and an affidavit describing the reasons that the attempt was unsuccessful.

As far as may be surmised from plaintiff's opposition, plaintiff did file a grievance with the AFGE; this grievance was received by Jeffrey Norman, the AFGE representative. Plaintiff Rosell chose to retain counsel to represent him in his grievance. Plaintiff Rosell's counsel requested the union to resolve the matter through arbitration. The AFGE subsequently contacted plaintiff Rosef through counsel and informed him that "in instances where an employee selects representation other than a union representative, the union will: 1) monitor the case through the administrative process; 2) not be obligated to take the case to arbitration; and 3) not be obligated to pay attorneys fees." Pl. Opp. to Def. Mot. to Dismiss, Exhibit 4. Plaintiff Rosell then withdrew his grievance.

In his affidavit, plaintiff Rosell asserts that the reason that he withdrew his grievance, and the reason that this Court should take jurisdiction despite any faults with his compliance with the grievance process, is that the AFGE refused to take his grievance to arbitration and has a practice of refusing to refer grievances to arbitration. Plaintiff Rosell's assertion is unpersuasive for several

reasons. First, there is insufficient evidence for the Court to find that plaintiff Rosell did indeed attempt to comply with the AFGE's negotiated grievance procedure. The grievance procedure of the AFGE requires the employee to submit a grievance form to several levels of FERC officials before the AFGE will even contemplate sending the grievance to an arbitrator; plaintiff Rosell has failed to proffer any facts showing that he attempted to comply with these preliminary steps required by the negotiated grievance procedure. Step 1 of the grievance procedure requires the employee to submit a grievance form to the employee's immediate supervisor, see Agreement Art. 17, § 11; the exhibits to plaintiff Rosell's opposition indicate that the grievance form was submitted to the AFGE representative, see Pl. Opp. to Def. Mot. to Dismiss, Exhibit 3, but there is no documentation showing that the grievance form was ever submitted to plaintiff Rosell's immediate supervisor. Plaintiff Rosell does assert that he requested the compensatory time from his supervisor and was denied, but there is no correspondence to indicate that the required grievance form was given to the supervisor. Steps 2 and 3 of the grievance process would have required plaintiff Rosell to submit the grievance form to the Office Director and then to the Executive Director; once again, there are no documents indicating that plaintiff Rosell complied with Steps 2 or 3 of the grievance procedure. The AFGE would not be obliged to even consider sending plaintiff Rosell's grievance to arbitration unless he had complied with those first three steps.

Second, plaintiff Rosell asserts that the AFGE flatly refused to refer his grievance to arbitration regardless of his compliance with the process. To the contrary, the correspondence proffered by plaintiff Rosell shows only that the AFGE informed plaintiff Rosell that the AFGE

was under no obligation to pursue arbitration for plaintiff Rosell's grievance, not a flat refusal by the AFGE to pursue arbitration. See Pl. Opp. to Def. Mot. to Dismiss. Exhibit 4.

Third. plaintiff Rosell asserts that the AFGE's purported refusal to pursue arbitration entitles him to have his claim heard in this Court because he has the right to have his claim adjudicated in some forum. This belief is incorrect; the AFGE is entitled to refuse to send a grievance through the arbitration procedure. AFGE officials have discretion to select grievances which will be referred to arbitration. See Agreement Art. 17 § 11 ("If the grievance is not satisfactorily settled at Step 3, the union may refer the matter to arbitration . . ."); id. § 15 ("If the grievance is not settled by this method, the union may refer the matter to arbitration. . ."). The AFGE's correspondence with plaintiff Rosell, informing him of its right not to pursue arbitration, is a correct statement of the grievance procedure;1 it would have been within the power of the AFGE to refuse to send plaintiff Rosell's dispute to arbitration, had plaintiff Rosell not withdrawn his grievance before such an action might have been taken.

For the foregoing reasons, this Court finds that plaintiff Rosell did not attempt to comply with the negotiated grievance process and therefore did not exhaust the remedies available through the CSRA. See Suzal v. United States Information Agency, 32 F.3d 574, 585 (D.C. Cir. 1994) ("[E]xhaustion of the nonjudicial remedies provided under the authority of the CSRA is a jurisdictional prerequisite.").

III. Conclusion

For the reasons given in the foregoing analysis, the Court finds that it does not have subject matter jurisdiction over this case because it is precluded by the Civil Service Reform Act. Defendant's Motion to Dismiss will be GRANTED.

A separate Order accompanying this Memorandum Opinion shall issue this day.

Date: 3-27-02
Royce C. Lamberth
United States District Judge

FOOTNOTES

1 Plaintiff Rosell asserts that it is the practice of the AFGE to generally refuse to send any grievance to arbitration. See Affidavit of Richard Allen Rosell, Pl. Opp. to Def. Mot. to Dismiss. Although the Court must construe the proffered facts liberally in favor of the plaintiff, see Wilderness Society v. Griles, 824 F.2d 4, 16 (D.C. Cir. 1987), plaintiff Rosell does not offer any support for his assertion. He proffers no other instances in which the AFGE has refused to pursue arbitration, nor does he proffer any evidence that the AFGE might indeed have such a practice.

No. 02-5129

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Richard Allen Rosell, On behalf of himself and similarly situated employees of the Federal Energy Regulatory Commission,
Appellant

v.

Pat Wood, III, Chairman, Federal Energy Regulatory Commission,
Appellee

November 18, 2002, Filed

ORDER

It is ORDERED, on the court's own motion, that a briefing schedule be established as follows.

Appellant's Brief	Mon, Jan 27 2003
Appendix	Mon, Jan 27 2003
Appellee's Brief	Wed, Feb 26 2003
Appellant's Reply Brief	Wed, Mar 12 2003

Appellant must raise issues and arguments in the opening brief. The Court ordinarily will not consider issues and arguments raised for the first time in the reply brief.

FOR THE COURT:
Mark J. Langer, Clerk

BY: Cheri Carter
Deputy Clerk

No. 02-5129

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Richard Allen Rosell, On behalf of himself and similarly situated employees of the Federal Energy Regulatory Commission,
Appellant

v.

Pat Wood, III, Chairman, Federal Energy Regulatory Commission,
Appellee

February 19, 2003, Filed

ORDER

It is ORDERED, by the Court on its own motion, that the above entitled case be scheduled for oral argument on Tuesday, May 6, 2003 at 9:30 AM before Circuit Judges Edwards, Sentelle and Garland.

The time and date of oral argument will not change absent further order of theCourt.

A further order of the Court will be issued regarding allocation of time for argument.

FOR THE COURT:
Mark J. Langer, Clerk

BY: Cheri Carter
Deputy Clerk

No. 02-5129

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Richard Allen Rosell, On behalf of himself and similarly situated employees of the Federal Energy Regulatory Commission,
Appellant

v.

Pat Wood, III, Chairman, Federal Energy Regulatory Commission,
Appellee

April 15, 2003, Filed

ORDER

BEFORE: Edwards, Sentelle and Garland, Circuit Judges

ORDER

Upon consideration of the briefs and all of the pleadings and proceedings had herein, and it appearing that the above case falls within the intent and purpose of Rule 34(j) of the General Rules of this Court and also meets one or more of the criteria set forth in that Rule, it is

ORDERED, by the Court, that the above case will be considered and decided without oral argument.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Cheri Carter
Deputy Clerk

Supreme Court, U.S.
FILED
NOV 2 4 2003
OFFICE OF THE CLERK

(2)

No. 03-454

In the Supreme Court of the United States

RICHARD ALLEN ROSELL, PETITIONER

v.

PAT WOOD, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's dismissal of petitioner's complaint for failure to exhaust his administrative remedies as required by a collective bargaining agreement.

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In the Supreme Court of the United States

No. 03-454

RICHARD ALLEN ROSELL, PETITIONER

v.

PAT WOOD, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 2a-3a) is unreported. The order and opinion of the district court (Pet. App. 7a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2003. The petition for rehearing was denied on June 27, 2003 (Pet. App. 1a). The petition for a writ of certiorari was filed on September 25, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a full-time, nonsupervisory, GS-13 auditor employed by the Federal Energy Regulatory

Commission (FERC) and a member of the American Federation of Government Employees (AFGE) Local No. 421, which has a labor management agreement (LMA) with FERC. Article 17 of the LMA sets out a grievance procedure that "shall be the exclusive procedure available to the Union and Bargaining unit employees for resolving grievances," with exceptions not relevant here. C.A. App. 74. The LMA defines a grievance as "a request for personal relief on any matter of concern or dissatisfaction to a bargaining unit employee, a group of bargaining unit employees or the Union." *Ibid.* The LMA further states that a grievance includes "any complaint * * * by any employee concerning any matter relating to the employment of the employee," and "any complaint * * * by any employee, or the Union, concerning * * * any claimed violation, misinterpretation or misapplication of any law, rule, or regulation affecting conditions of employment." *Ibid.*

In 2001, petitioner submitted to his supervisor requests for compensatory time for time spent traveling on days outside his basic work week. His supervisor denied both requests. Pet. App. 8a. Pursuant to Article 17 of the LMA, petitioner, through his counsel, submitted a grievance to the union to challenge the agency's decision not to grant his request for compensatory time. C.A. App. 129. On June 11, 2001, the union president responded to petitioner's counsel by memorandum that stated that petitioner had the right to choose representation other than the union and that, "where an employee selects representation other than a union representative, the union will: (1) monitor the case through the administrative process; (2) not be obligated to take the case to arbitration; and (3) not be obligated to pay attorney fees." *Id.* at 130. He further

noted that petitioner's grievance was "subject to the grievance procedure as set forth in Article 17 of the Labor/Management Agreement" and "[i]f you have any questions or need additional information, please call me." *Ibid.* On June 14, 2001, petitioner notified the union that he was withdrawing the complaint. *Id.* at 131.

2. On June 19, 2001, petitioner filed this suit on behalf of himself and purportedly similarly situated employees of the FERC alleging violations of the overtime pay provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* In response to FERC's motion to dismiss on the ground that petitioner had failed to follow the grievance procedures contained in the LMA, petitioner argued that the district court could not properly rule on FERC's motion without discovery and an evidentiary hearing. The district court granted FERC's motion on the ground that petitioner had failed to follow the grievance procedures contained in the LMA. Pet. App. 12a-17a.

3. In an unpublished judgment, the court of appeals (Pet. App. 2a-3a) affirmed the district court's ruling, stating that "[f]or the reasons articulated by the district court, we agree that [petitioner] did not comply with the grievance procedures provided by the [LMA], as he was required to do under the Civil Service Reform Act, 5 U.S.C. § 7121(a) (1996)." *Id.* at 3a.

ARGUMENT

1. The court of appeals in an unpublished decision affirmed the district court's dismissal of petitioner's complaint because petitioner did not exhaust the negotiated grievance procedures provided in the LMA between petitioner's union and FERC. The LMA in this case unequivocally provides that it "shall be the

exclusive procedure available to the Union and Bargaining unit employees for resolving grievances," C.A. App. 74, and the district court found that "[petitioner] did not attempt to comply with the negotiated grievance process" in the LMA, Pet. App. 17a. The court of appeals accordingly correctly affirmed the dismissal of petitioner's complaint because petitioner did not follow the procedures set forth in the LMA. That fact-bound and unpublished decision does not warrant further review by this Court.*

2. Petitioner argues (Pet. 8-18) that this Court's review is warranted because he was allegedly deprived of his Seventh Amendment right to a jury trial. That contention lacks merit. The Seventh Amendment right to a jury trial does not apply to suits against the United States. *City of Monterey* v. *Del Monte Dunes, Ltd.*, 526

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* In *Asociacion de Empleados Del Area Canalera* v. *Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003) and *Mudge* v. *United States*, 308 F.3d 1220 (Fed. Cir. 2002), the courts of appeals rejected the contention that Section 7121(a)(1) of the Civil Service Reform Act (CSRA), 5 U.S.C. 7121(a)(1), which provides that the negotiated procedures in a collective bargaining agreement "shall be the exclusive administrative procedures for resolving grievances which fall within its coverage," bars a judicial remedy for grievances covered by the agreement. Neither of those decisions addressed the government's alternative contention that, irrespective of the CSRA, resort to a judicial remedy was foreclosed by the exclusivity provision of the collective bargaining agreement. The summary unpublished decision of the court of appeals below does not mention either *Panama Canal Comm'n* or *Mudge*, or indicate whether it was affirming the dismissal of petitioner's complaint because the CSRA foreclosed a judicial remedy or because *the LMA* foreclosed a judicial remedy. Nor did petitioner bring either decision to the attention to the court of appeals. Particularly because the LMA clearly foreclosed petitioner's suit, this case presents no occasion to determine whether the CSRA also foreclosed the suit.

U.S. 687, 719 (1999). It also does not prohibit the grant of summary judgment, *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 319-21 (1902), or a dismissal for lack of jurisdiction, *e.g.*, *Statland* v. *United States*, 178 F.3d 465, 472 (7th Cir. 1999).

Petitioner similarly erroneously argues (Pet. 10-14) that the Federal Arbitration Act afforded him a right to a jury trial. That Act only applies when a person is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration." 9 U.S.C. 4. The LMA arbitration provision here was never properly invoked. Pet. App. 17a. Furthermore, the remedy under the Act for a refusal to arbitrate is an order requiring the parties to go to arbitration, not a trial in district court on the underlying issues. 9 U.S.C. 4.

3. Petitioner also argues (Pet. 19-22) that the district court denied him due process in dismissing his complaint without affording him discovery and an evidentiary hearing. That claim too lacks merit. Petitioner received and took advantage of the opportunity to present affidavits and other evidence to the district court. His own submission, however, demonstrated that he had not followed the grievance procedures set forth in the LMA. Pet. App. 15a-17a. Presented with uncontroverted evidence that petitioner had failed to avail himself of the grievance procedures under the LMA, the district court correctly concluded that no further proceedings were necessary. See *Wilderness Soc'y* v. *Griles*, 824 F.2d 4, 16 n.10 (D.C. Cir.) ("[T]he plaintiff should have an opportunity to develop and argue the facts in a manner that is adequate in the context of the disputed issues and evidence."), cert. denied, 454 U.S. 897 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the

Supreme Court of the United States

RICHARD ALLEN ROSELL, ON BEHALF OF HIMSELF AND SIMILARLY SITUATED EMPLOYEES OF THE FEDERAL ENERGY REGULATORY COMMISSION,

Petitioners,

v.

PAT WOOD, III, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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QUESTIONS PRESENTED

Respondent's question is unrelated to the issues raised by the Petition. It is entirely irrelevant to the gravamen of the Petition whether or not the courts below *correctly or incorrectly conjectured* as to whether Petitioner exhausted his administrative remedies under the routine *common law contract* known as Labor/Management Agreement [LMA]. Invoking his Seventh Amendment right, Petitioner demanded to be heard by a jury as to all charges and counter-charges of breach of contractual obligations (including exhaustion of so-called administrative remedies) under the LMA. Further disputing Respondent's claim that he has any contractual obligation under the LMA or any other contractual instrument to arbitrate any of his disputes, Petitioner demanded his statutory jury trial right for resolution of the subject issue pursuant to § 4 of the Federal Arbitration Act [FAA], 9 U.S.C. § 1, et. seq.

Abnegating Constitutional and statutory mandates, the courts below denied the Petitioner (and the class he represents) fundamental Constitutional and statutory rights to be heard by a jury on contested, common law contractual matters. Such distinct violations now permeate the inalienable jury trial rights of nearly two million Federal Civil Service Employees.

The Questions the Petition presents are precisely what the *raison d'etre* of this Supreme Court envision. The writ should be granted.

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JURISDICTION

This Court's subject-matter jurisdiction over the Petition is not contested.

REPLY TO RESPONDENT'S "STATEMENT"

1. Respondent's Statement merely affirms the highly contested nature of the common law contractual disputes erroneously resolved by the courts below instead of a jury. Such is the state of the dispute between the parties that there is even no accord as to which provision of the common law contract (the LMA) actually controls. Petitioner's "class-based" FLSA claims are not issues of Article 17 of the LMA generally, but of Article 17 Section 15[1] specifically–a provision distinct and different from the provision upon which the Respondent predicates its entire Opposition.

2. The Statement is also remiss of the highly contested common law contractual issues as to whether or not the Petitioner has fulfilled all of his contractual

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[1]It provides, in relevant part: "**Grievances which may impact on more than one employee** may be submitted in writing by the Local President (or designee) directly to the Executive Director (or designee).

"The grievance shall be specific concerning the act(s) complained of, including date(s) and person(s) involved; the provision(s) by Article and section of this Agreement, alleged to be misinterpreted or misapplied, if a violation of the Agreement is alleged, otherwise the grievance must specify the rule, regulation, or policy or conditions of employment alleged to have been violated; and the corrective action desired ...." [Emphasis added].

obligations under the LMA (and, conversely, whether the Respondent failed its contractual obligations under the LMA)–issues exclusively within the province of a jury to resolve.

3. Indeed, such is the state of failure of the Statement that it completely omits to even make a passing reference to the fact that Petitioner's grievance (as well as underlying lawsuit) was filed *"on behalf of himself and similarly situated employees of the [Agency]"* and, thus, subject to the class-based procedures of the LMA. The omission is further notable inasmuch as the Opposition's cover page does not state the formal caption of the Petition:

"RICHARD ALLEN ROSELL, ON BEHALF OF HIMSELF AND SIMILARLY SITUATED EMPLOYEES OF THE FEDERAL ENERGY REGULATORY COMMISSION."

REPLY TO RESPONDENT'S "ARGUMENT"

1. Respondent's first argument regurgitates the district court's erroneous finding that the LMA is "the exclusive procedure available to the Union and Bargaining Unit employees for resolving grievances" and that Petitioner "did not attempt to comply with the negotiated grievance process." This is simply begging the question. It was not for the district court to resolve either factual dispute and those implicit inasmuch as jury trial was demanded both under the Seventh Amendment and the FAA. The latter to address the Respondent's claim that the Petitioner (and the class he represents) are bound by a valid contract to arbitrate the myriad of contractual claims and counter-claims the

court resolved in chambers.

2. Simply put, the Respondent's second argument is bizarre. Citing *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 719 (1999), Respondent makes the blanket assertion–quote– "(t)he Seventh Amendment right to a jury trial does not apply to suits against the United States." Neither at the cited page (719) or anywhere else in said decision has this Court even suggested the elimination of the Seventh Amendment with respect to the United States. While *City of Monterey* addressed the narrow and specific issue as to jury trial right associated with governmental exercise of eminent domain (regulatory taking) and compensation claims, the decision itself affirmed the propriety of jury trial and verdict upon which the dispute was predicated. Indeed, citing its precedent in *Markman v. Westview Instruments*, Inc., 517 U.S. 370 (1996), this Court reiterated in *City of Monterey* the central tenet:

> "In actions at law, issues that are proper for the jury must be submitted to it 'to preserve the right to a jury's resolution of the ultimate dispute,' as guaranteed by the Seventh Amendment." At page 718.

Although, as a general principle, the United States does have sovereign immunity, it is neither absolute nor beyond constitutional reach. To wit, it has been held:

> **"... Congress has the right to prescribe terms upon which the government consents to be sued. But it cannot**

> **authorize the government to sue an individual in suit at common law, and deny him therein a trial by jury. Nor can it do this indirectly by attaching to his right to sue the government a condition that he shall surrender a privilege guaranteed him by the Constitution. He may, by formally giving his assent thereto, waive the right of trial by jury; but it is the duty of Congress to *preserve* the right in all suits at common law."** *McElrath v. United States*, Sup. Ct., 426, 430-431 (Oct. 1880). [Italics in original].

Here, the Respondent has not identified a single statutory term or condition set by Congress that proscribes or delimits Petitioners' Seventh Amendment right to be heard by a jury on the myriad of common law contractual issues at bar. Nor is there any suggestion that in subjecting itself to the negotiation and execution of a routine collective bargaining contract (LMA), the Respondent (an agency of the United States) was acting or engaging in any matter that may be perceived governmental or sovereign. It engaged in the same actions and transactions that employers in private industry routinely are involved in (i.e. negotiate and contract collective agreements with their employees) without abnegating the supremacy of the Seventh Amendment. And there is nothing to suggest that the Petitioners have formally given their consent to waive or abandon their Constitutional right tangent to the LMA. They have not done so and the Respondent does not claim so.

What is left of the Respondent's argument is its cite to *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902). Far from affording the Respondent support for its proposition, the decision merely addresses pleading standards that have long been repealed by the Federal Rules of Civil Procedure.

As for Respondent's argument that the FAA does not afford Petitioner jury trial right or that the provision "was never properly invoked,"suffice it to note that the Petitioner specifically invoked his right under FAA § 4 (see, inter alia, C.A. APP, page 118). The provision itself is misquoted. FAA, 9 U.S.C. § 4 is in no way confined, as Respondent have us believe, to a person "aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration." The contrary is true and the provision speaks for itself:

> " .... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. *If no jury trial be demanded by the party alleged to be in default, ..., the court shall hear and determine the issue. Where such an issue is raised, the party alleged to be in default may ... demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for*

> *arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. ....*" [Italics added].

Against the Respondent's claim that "arbitration" is "the exclusive remedy" available to him under the LMA, Petitioner maintained and still maintains that he made no accord under the LMA or any other contract to submit his claims at bar to arbitration and that no valid arbitration agreement exists between him and the Respondent. He demanded his jury trial right which was denied.

There is, indeed, nothing the Opposition proffers to controvert Petitioners' claim that their Seventh Amendment and statutory [9 U.S.C. § 4] rights to jury trial were violated by the courts below.

3. Respondent also disputes Petitioners' claim that they were denied equitable enforcement of "cardinal principles of justice" pronounced by the appeals' court itself as set forth at pages 19-22 of the Petition. The remarkable failure of the Opposition to address said claim is self-evident.

CONCLUSION

It cannot be more apparent that the Respondent's Opposition has wholly failed to address the gravamen of the Petition at bar.

WHEREFORE, Petitioners' respectfully submit that their petition for writ of certiorari should be GRANTED.

RESPECTFULLY SUBMITTED,

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